MOTION FILED
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No. 01-881

IN THE

Supreme Court of the United States

GENERAL ELECTRIC CAPITAL CORP., and
MONTGOMERY WARD CREDIT SERVICES, INC.,

Petitioners,

v.

GARY A. THIESSEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE UNITED STATES CHAMBER OF COMMERCE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to S. Ct. Rule 37.2, the Chamber of Commerce of the United States (the Chamber) moves for leave to file a brief *amicus curiae* in support of the Petition for a Writ of Certiorari to the Tenth Circuit. A copy of the proposed brief is attached. The Chamber is filing this Motion because Respondent has refused to consent to the filing of this brief. In further support of this Motion, the Chamber notes the following:

1. The Chamber is the world's largest federation of business companies and associations, with an underlying membership of nearly 3,000,000 businesses and professional organizations of every size, in every industry sector, and every region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of concern to American business.

2. One continuing concern of the American business community has been the proper interpretation and application of the employment discrimination laws in general, and the conduct of employment discrimination litigation in particular. The Chamber of Commerce, with the consent of the parties or the Court, has filed *amicus curiae* briefs in the Court in numerous recent employment discrimination cases, including *Toyota v. Williams*, 122 S. Ct. 681 (2002); *Circuit City Stores v. Adams*, 532 U.S. 105 (2001); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

3. The decision below creates and deepens significant and mature circuit splits of authority in an area of particular concern to the Chamber and its members — class action employment discrimination litigation. The Tenth Circuit, in contrast to decisions in other circuits, mandated the application of the two-stage proof paradigm established by the Court in *Teamsters v. United States*, 431 U.S. 324 (1977), to this case, a collective action brought under the Age Discrimination in Employment Act, and to virtually every other type of employment discrimination class action. The decision below raises significant Seventh Amendment and due process issues by mandating the continuing applicability of a bifurcated trial procedure that was adopted before jury trials were available in employment discrimination class actions. The Tenth Circuit also joined several sister circuits by precluding lower courts from conducting any meaningful analysis of evidence proffered by class representatives at the certification stage, claiming that such analysis is forbidden by the Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

4. In combination, the rulings below eliminate any judicial discretion on the part of the lower courts when determining whether to proceed with a class action, rendering such decisions little more than formalities. They also reflect the disarray in which the lower courts find themselves on the most fundamental questions posed in multi-party employment discrimination litigation. The Chamber believes that the instant case, as well as *Robinson v. Metro-North Commuter R.R. Co.*, 267 F. 3d 147 (2d. Cir.), *pet. for cert. filed*, 70 U.S.L.W. 3429 (2001) (No. 01-908), in which a writ of *certiorari* also is being sought with the Chamber's support, present exceptionally significant issues in this area with great clarity. The Chamber submits that its views on these issues would be useful to the Court in determining whether to grant the Petition, and in deciding the issues posed in the event that review is granted.

Accordingly, the Chamber respectfully moves the Court to grant this Motion and allow the filing of the attached brief.

Respectfully submitted,

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INTEREST OF THE AMICUS

The Chamber of Commerce of the United States (the Chamber) is identified in the preceding Motion for Leave to File. Its interest in this matter is more completely expressed in the preceding Motion for Leave to File and in the Summary of Argument section below, and thus will not be restated at further length in this section.[1]

I. SUMMARY OF ARGUMENT

1. Since 1991, when Congress first authorized the recovery of compensatory and punitive damages and provided for jury trials under Title VII of the Civil Rights Act, there has been an explosion of employment discrimination litigation in the federal courts. During the 1990's, the number of employment discrimination cases filed in the federal courts nearly tripled,[2] an increase matched by the number of employment discrimination class actions filed annually in the federal courts.[3] There currently are 170 employment discrimination class actions pending in the federal courts,

1. Pursuant to Sup. Ct. Rule 37.6, the Chamber affirms that neither Petitioners nor Respondent has assisted the Chamber or its counsel in any way (including but not limited to providing expenses) in connection with the preparation or filing of this brief.

2. 8,413 civil rights employment cases were filed in the federal courts in 1990; in 1998 23,375 such cases were filed. *See* DOJ SPEC. REP., *Civil Rights Complaints in U.S. District Courts 1990-1998*, (January, 2000), at 1-2 (concluding that "[t]he growth of civil rights cases has been due largely to the increase in employment cases between private parties."). *See also Judicial Business of the United States Courts: 2000 Annual Report of the Director*, at Table C-2 (reporting that 21,928 employment cases were filed in 2000).

3. *See 1999 Federal Court Class Action Statistics*, Class Action Reports, Table 6 (employment class actions rose from a low of 30 filed in 1992 to 85 filed in 1998).

affecting the lives and livelihoods of tens of thousands of American workers and their employers.[4] Many other employment discrimination class actions are no longer pending because they recently have been resolved through widely reported multi-million dollar settlements, setting the stage for additional class action litigation.[5]

2. Despite the substantial importance of these cases and the profusion of new litigation, the Court has not addressed employment discrimination class actions for two decades, and never has opined upon how the expansion of relief, and the availability of jury trials, affects multi-plaintiff employment discrimination litigation. Unguided by any recent rulings from the Court, the lower courts have failed to deal consistently or adequately with many of the exceptionally important legal issues that have arisen in such large and significant cases.

3. For example, despite the Court's specific admonition in *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982), that the lower courts cannot certify a class action absent a "rigorous analysis" to ensure that appropriate procedural requirements have been met,[6] numerous appellate courts —

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4. *See Judicial Business of the United States: 2000 Report of the Director*, at Table X-4.

5. *See generally Court Approves $192.5 Million Settlement In Race Bias Class Action Against Coca-Cola*, Daily Labor Report (BNA) No. 127, at 1-5 (July 3, 2001); *Texaco Corp. Agrees To Spend $176 Million to Settle Race Bias Suit*, Daily Labor Report (BNA) No. 222, at D-4 (Nov. 18, 1996); *Judge Gives Final Approval to Settlement under which Publix will pay $81.5 million*, Daily Labor Report (BNA) No. 102, at D-26 (May 28, 1997).

6. 457 U.S. at 161. This admonition was repeated outside the employment discrimination context in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 633-636 (1997).

including the court below — have hamstrung district judges who have attempted to perform the required analysis by preventing them from engaging in any meaningful factual inquiry when deciding whether to proceed with a class action. According to the court below, and to several sister circuits,[7] virtually any analysis of facts in deciding whether to certify a class is an improper inquiry into the merits of the case of the sort forbidden by the Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), guaranteeing that mere allegations made by the class plaintiffs will suffice to warrant class certification.

4. Similarly, the court below demanded that district courts under its supervision apply the two-stage proof paradigm derived from the Court's decision in *Teamsters v. United States*, 431 U.S. 324 (1977), in virtually every employment discrimination class or collective action. By affording bare allegations of a pattern-or-practice of discrimination talismanic significance, the court below disposed of evident and troubling Seventh Amendment and due process questions about the propriety of a bifurcated trial procedure that was adopted by the Court under a different statute for bench trials prosecuted by the government in a representative capacity. The court of appeals gave no heed to whether this model makes sense when money damages are at issue, when the case is to be tried to a series of juries *seriatim*, or where the lawsuit is an opt-in action and has no representative character.

5. Where courts have adopted this uncritical approach to class actions, the result has been to diminish and in some cases all but to eliminate the plaintiffs' burden of proving that a particular case is suitable for class treatment, a result

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7. *See, e.g., Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir.), *pet. for cert. filed*, 70 U.S.L.W. 3429 (2001) (No. 01-908).

directly at odds with the Court's ruling in *Falcon* and with the law in several other circuits.[8] Certifications based upon such questionable legal analysis have led to multi-million dollar settlements in which employers, facing huge liabilities and crushing legal fees following certification, have chosen to settle rather than to fight.[9]

6. At the same time, in other circuits where the burden of proof retains some rigor, class plaintiffs have attempted to circumvent the complications attendant to trying damage actions before juries by jettisoning any claim of absent class members to pursue compensatory or punitive damages or, in some instances, even trial by jury, opting instead to proceed without full relief.[10] The possibility that such a strategic

8. *See, e.g., Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 422 (5th Cir. 1998); *Szabo v. Bridegport Machines, Inc.*, 249 F.3d 672, 675 (7th Cir.), *cert. denied*, 122 S. Ct. 348 (2001) ("The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it."); *Johnston v. HBO Film Management, Inc.*, 265 F.3d 178 (3d Cir. 2001).

9. As one commentator recently observed, "[o]nce plaintiffs obtain class certification, the defendant's exposure, plus projected costs of defending hundreds or thousands of individual claims, places almost overwhelming and irresistible pressure on the defendant to settle, regardless of the merits of the claims." Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 15 Lab. Law. 415, 417 (Winter/Spring 2000). *See also* Fed. R. Civ. P. 23(f), Adv. Comm. Notes (1998) ("An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.").

10. *Federal Court Certifies Boeing Class; Female Employees Allege Job Disparities*, Daily Labor Report (BNA) No. 204, at A-2 (Oct. 24, 2001) (attorney for class of Boeing employees noting that the class had not requested compensatory damages to minimize

(Cont'd)

decision might foreclose absent class members from obtaining full relief has led some courts to refuse to entertain such efforts,[11] while other courts have refused to allow the recovery of back pay in certified actions where the right to compensatory and punitive damages has been waived.[12]

7. Neither class members seeking relief nor employers facing enormous liability and huge legal fees are served by such dramatic uncertainty in the law. Respectfully, the Chamber submits that guidance by the Court on the impact of trial by jury and expanded remedies upon the maintenance and conduct of employment discrimination class actions is desperately required. For reasons more fully developed below and elsewhere, the instant case and the companion case of *Robinson v. Metro North Commuter R.R.*, No. 01-908, in which a writ of certiorari also is being sought with the support of the Chamber, are ideal vehicles for addressing these very significant issues and bringing necessary clarity to this field.

II. STATEMENT OF THE CASE

Respondent Gary A. Thiessen ("Respondent" or "Thiessen") is a former employee of Petitioners Montgomery Ward Credit Services, Inc. ("MWCS") and General Electric Capital Corp. ("GECC"). In 1996, Thiessen commenced an age discrimination action on behalf of himself and other

(Cont'd)
certification problems under Fed. R. Civ. P. 23(b)(2)); *Federal Judge Certifies Class Action In Black Worker's Suit Against Publix*, Daily Labor Report (BNA) No. 57, at A-3 (Mar. 25, 1999) (class counsel in suit against Publix commenting on decision to forego damages, withdraw jury demand and strike employer's jury demand).

11. *See Zachery v. Texaco Exploration and Production, Inc.*, 185 F.R.D. 230 (W.D. Tex. 1999).

12. *See Beck v. Boeing*, 203 F.R.D. 459 (W.D. Wash. 2001).

"similarly situated" current and former employees of Petitioners, alleging that Petitioners had developed a "blocker policy" that was used to identify older workers who were "blocking" younger workers from being promoted. *Thiessen v. General Elec. Capital Corp.*, 267 F.3d 1095, 1100 (10th Cir. 2001). This alleged policy purportedly included the creation of a list of "blockers" who were targeted for various adverse employment actions, including negative employment evaluations, demotions and termination. *Id.* at 1100-01.

In 1998, the district court conditionally certified a class of opt-in plaintiffs under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 216(b).[13] Although the opt-ins alleged disparate adverse employment actions reaching across a number of states, the court concluded that Thiessen's evidence of a company-wide policy of age discrimination rendered the opt-ins "similarly situated" for purposes of conditional certification. *Id.* at 1101. The court indicated that it would reconsider certification after discovery. *Id.* at 1101-02.

After discovery, the district court decertified the class and dismissed the opt-in plaintiffs without prejudice to any individualized claims they might later bring. The court found that Thiessen was not "similarly situated" to the proposed class, because there was no evidence linking the "blocker

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13. The ADEA borrows the collective action framework Congress first adopted for the Fair Labor Standards Act ("FLSA"), rather than the class action procedures of Fed. R. Civ. P. 23. Under the ADEA's opt-in procedure, individuals with claims who are "similarly situated" can affirmatively opt in to the litigation and have their claims heard as part of the same suit. Although the terminology and procedures used in the FLSA vary somewhat from those applicable under Fed. R. Civ. P. 23, as the court of appeals acknowledged, there is little practical difference between the ADEA's "similarly situated" test and Rule 23's commonality and typicality requirements. *See Thiessen*, 267 F.3d at 1105.

policy" and the challenged adverse employment actions. *Id.* at 1103-04. Further, the court determined that individual issues would predominate at trial given the individualized defenses asserted by defendants. *Id.* at 1104. Finally, the court held that plaintiffs' proposed two-stage trial plan, based on *Teamsters v. United States*, 431 U.S. 324 (1977), would "render individualized consideration of the claims impossible and impose extraordinary burdens on the jury." *Id.* at 1105 (citation omitted).

Respondent appealed the decertification decision and the Tenth Circuit reversed. Relying upon Rule 23 cases in that circuit, the court below held that the district court erred because its decision that the plaintiffs were not similarly situated "encompass[ed] factual issues relevant to [the pattern-or-practice] trial" on the merits, an inquiry forbidden at this preliminary stage of the case. *Id.* at 1106.

The court also held that, given the pattern-or-practice allegation, application of the two-stage trial plan outlined in *Teamsters* was mandatory, because failing to follow the *Teamsters* paradigm would "effectively deprive[] plaintiffs of [the] procedural advantage" that, "if plaintiffs were able to establish a pattern or practice of discrimination [in the first stage of trial], they would be entitled to a presumption that the individual employment actions taken against them were the result of such discrimination." *Id.* at 1107.[14] At the same time, to address the manageability issues raised by the district court, the circuit court held that in Phase I of a bifurcated trial in which plaintiffs sought to prove the

14. The court added that "[w]e do not hold that whenever there is evidence of a pattern-or-practice, a class must be certified." *Id.* at 1108. But this disclaimer rings hollow given the court's holding that: 1) application of the *Teamsters* paradigm is mandatory in a pattern-or-practice case; and 2) as a result of the need to apply this paradigm, the requirements for a class action are satisfied. *See id.* at 1106-07.

existence of a pattern-or-practice of discrimination, Petitioners would be limited in their proof to evidence concerning "a few common defenses." *Id.* Individualized proof concerning whether the "blocker" policy had been applied to the particular class members would be relegated to Phase II of the trial, assuming plaintiffs had successfully proven a pattern-or-practice. The Tenth Circuit remanded the case to the district court, directing that the matter proceed as a collective action. A timely petition for a writ of certiorari followed.

III. ARGUMENT

A. THE LOWER COURT'S REQUIREMENT THAT A CLASS BE CERTIFIED TO PRESERVE A "PROCEDURAL ADVANTAGE" SUPPOSEDLY DERIVED FROM THE COURT'S DECISION IN TEAMSTERS WARRANTS REVIEW.

1. The Decision Addresses An Issue Of Critical Importance On Which There Is Substantial Disagreement Among The Courts Of Appeals.

In *Teamsters v. United States*, 431 U.S. 324 (1977), the Court endorsed a bifurcated proof scheme for managing so-called "pattern-or-practice" cases brought by the federal government under Title VII. Although the Court specifically observed that "not all class actions will necessarily follow [this] model," 431 U.S. at 360, without any further guidance from the Court as to how and where this paradigm might profitably be employed, the lower courts have applied this paradigm to very different kinds of cases. *Teamsters* was a government action; the courts of appeals have applied it to cases brought by private litigants. In *Teamsters*, the government sought injunctive and other equitable relief; several courts of appeals have applied it to damage actions.

Teamsters was tried to the bench; certain courts of appeals have tried to force-fit *Teamsters* into the jury trial milieu. The court below went as far as it is possible to go with *Teamsters*; it compelled the district courts it supervises to use the framework even in ADEA collective actions, which are brought under an entirely different statute and have no representative character at all.

The Tenth and the Second Circuits effectively require that their district courts apply the *Teamsters* paradigm in virtually every multi-plaintiff employment discrimination class action. *See Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 169 n.13 (2d Cir. 2001). The Fifth and Eleventh Circuits, by contrast, have held that the *Teamsters* framework is largely unworkable when applied to large-scale class actions where substantial damages are sought and there is a right to trial by jury. *See, e.g., Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 419 (5th Cir. 1998); *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228 (11th Cir. 2000), *cert. denied*, 121 S. Ct. 1354 (2001). Commentators have repeatedly questioned whether *Teamsters* is applicable in cases where damages are sought or where a jury trial is required.[15]

The substantial disagreement among the circuits is not surprising when one recalls that the *Teamsters* paradigm was developed almost 25 years ago, when damages were not available under Title VII of the Civil Rights Act of 1964,

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15. *See generally* Kramer, *supra*, note 9, at 475-76 (*Teamsters* paradigm not automatically applicable in cases involving jury trials and legal relief); Keith R. Fentonmiller, *Damages, Jury Trials and the Class Action Under the Civil Rights Act of 1991*, 12 Lab. Law. 421, 441-42 (1997) ("it is questionable whether the *Teamsters* approach of bifurcating liability and damages issues is constitutional now that Title VII affords a right to jury trial and damages.").

before jury trials were held available under the ADEA,[16] and when large scale jury trials in employment discrimination cases were essentially non-existent. The fundamental nature of employment discrimination cases has since changed drastically, particularly following enactment of the Civil Rights Act of 1991, which makes damages and jury trials generally available in disparate treatment cases. In light of this sea change, the Court urgently needs to address the issues arising from the attempts of lower courts, including the Tenth Circuit, to superimpose the framework for equitable relief endorsed in *Teamsters* on this new legal landscape.

The need for review is all the more acute given the rising tide of employment discrimination class actions noted above. The split among the circuits presents a particularly serious problem for Chamber members with nationwide operations, as sophisticated class action counsel can and will engage in forum shopping when launching a nationwide class action. In such cases, the geographic breadth of the Second and Tenth Circuits offers ready access to the *de minimis* class certification standards recognized in *Thiessen* and *Robinson*. The fundamentals of federal law should not depend on geographic happenstance. There is an acute need for review by the Court to secure uniformity of decision on this important issue.

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16. The Court first held that jury trials were available in ADEA cases in *Lorrilard v. Pons*, 434 U.S. 575 (1978).

2. The Lower Court's Mandatory Resort To *Teamsters* To Preserve A "Procedural Advantage" For Plaintiffs Is Unworkable, Unfair And Unnecessary.

By insisting that the lower courts apply the proof paradigm derived from *Teamsters* in every class action in which a pattern-or-practice of discrimination is alleged, the court below has created intractable legal problems that warrant review by the Court. The *Teamsters* model cannot be administered in a case like this without impairing a defendant's rights under the Seventh Amendment and the Due Process Clause.

As the district court noted, a trial of a class action involving as many as 30 opt-in plaintiffs will require individualized consideration of widely varying adverse employment actions spanning nearly ten years. *See Thiessen*, 267 F.3d at 1101-04. Attempting to try this multitude of issues in a single action is usually completely unworkable. As a consequence, once a broad-based class action is certified, a settlement becomes mandatory; there is no practical alternative. *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298-99 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995) (noting the "intense pressure to settle" imposed by the possibility of a huge judgment); Kramer, *supra*, note 9, at 417. This conventional wisdom among practitioners is confirmed by the limited empirical evidence that is available. Diligent research has disclosed no reported case in which a *Teamsters*-type action of any size was tried to the completion of Phase II proceedings before a jury. *See also* Willging, Hooper & Niemic, *Empirical Study Of Class Actions In Four Federal District Courts*, at 66-67 (Fed. Judicial Ctr. 1996) (study of all class actions terminated during a two year period in four judicial districts reported only one certified *Teamsters* class action, which settled after "protracted" proceedings).

To avoid the multitude of individualized claims that the district court properly believed made this case unsuitable for class or collective treatment, the Tenth Circuit ordered a Phase I jury trial of plaintiffs' so-called pattern-or-practice claims limited to the question of whether "a pattern or practice of discrimination [existed] and whether it continued after the fall of 1994." *Thiessen*, 267 F.3d at 1107. On this critical issue, the court intimated that Petitioners could only present evidence concerning "a few common defenses" and would be precluded from presenting "'highly individualized' defenses to each of the incidents of individual discrimination alleged by plaintiffs. . . ." *Id.*

The most effective means of rebutting plaintiffs' claim that the "blocker" policy continued in effect after the fall of 1994, however, will likely be to review individual employment decisions that occurred after that date to demonstrate that they were non-discriminatory. *See Ardrey v. United Parcel Service*, 798 F.2d 679, 683 (4th Cir. 1986) (recognizing employer's right to defend itself in pattern-or-practice case by proving that individual actions were justified by non-discriminatory reasons); *Coates v. Johnson & Johnson*, 756 F.2d 524, 532 (7th Cir. 1985) (same). By precluding introduction of such highly probative evidence at Phase I, the Tenth Circuit acted contrary to the Court's admonition in *Teamsters*, 431 U.S. at 360 n.46 (noting that in Phase I "[w]e do not mean to suggest that there are any particular limits on the type of evidence an employer may use"), and established a procedure that will inevitably preclude the defendant from presenting its most effective defense at the most significant stage of the litigation, where an overbroad order can "force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."[17] This is a clear denial of due process. *See Western*

17. Fed. R. Civ. P. 23(f), Adv. Comm. Notes (1998). This overwhelming pressure exists "even when the plaintiff's probability of success on the merits is slight." *Blair v. Equifax Check Servs. Inc.*, 181 F.3d 832, 835 (7th Cir. 1999).

Electric Co. v. Steen, 544 F.2d 1196, 1199 (3d Cir. 1976) ("[T]o deny [an employer] the right to present a full defense on the issues would violate due process.").

The Tenth Circuit's procedure also threatens Petitioners' jury trial rights. Under the Re-Examination Clause of the Seventh Amendment,[18] "[t]he right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have juriable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact." *Rhone-Poulenc*, 51 F.3d at 1303. An employer thus has the right to have a single jury consider all facts and evidence relevant to the pattern-or-practice claim. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 419 (5th Cir. 1998) (affirming denial of motion for class certification where potential overlap of issues to be decided in bifurcated proceedings "implicated significant Seventh Amendment" concerns). By asking one jury to consider only generalized evidence concerning the "blocker" policy and by demanding that a series of subsequent juries consider the overlapping question of whether the policy was ever applied to a particular class member, the lower court's decision strips the employer of this important procedural protection and prevents it from presenting a comprehensive defense to a single finder of fact. *See also Blyden v. Mancusi*, 186 F.3d 252, 268 (2d Cir. 1999); *Castano v. American Tobacco Co.*, 84 F.3d 734, 750-51 (5th Cir. 1996).

This unfair and unworkable procedure is allegedly justified to provide plaintiffs with a "procedural advantage" allegedly derived from *Teamsters* which reduces their burden of proof at the second stage of a bifurcated trial. But the shifting burdens of proof outlined in *Teamsters* do not

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18. *See* U.S. Const. Amend. VII ("[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.")

constitute a substantive right under the employment discrimination laws. To the contrary, as the Court has emphasized on a number of occasions, such presumptions merely constitute possible methods of analyzing what is always plaintiff's fundamental burden — to prove intentional discrimination. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 514 (1993) (observing that although the court "may, according to traditional practice, establish certain modes and orders of proof" such evidentiary aides do not "substitute for the required finding that the employer's action was the product of unlawful discrimination."); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (stating that the burden shifting test under *McDonnell Douglas* "was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.").

Teamsters described an orderly mechanism for dealing with a particular type of case. The court of appeals took this helpful procedural tool, extended it to a type of case that shares none of *Teamsters* defining characteristics, and transformed it into an inalienable right. Unfortunately, the court of appeals is not alone; in the 25 years since *Teamsters*, the tool has taken on a life of its own in the lower courts and has assumed a role the Court never intended. The Court should take this occasion to consider application of the *Teamsters* paradigm to circumstances never considered at the time it was created.

B. THE COURT SHOULD RESOLVE WHETHER A DISTRICT COURT IS REQUIRED TO MAKE ESSENTIAL FINDINGS OF FACT AT THE CLASS CERTIFICATION STAGE EVEN THOUGH THE ISSUES OVERLAP WITH THE MERITS OF THE CASE.

The district court found that this case could not proceed as a class action, because, *inter alia*, there was no common policy linking the disparate employment actions plaintiffs sought to challenge and there was no evidence that members of the class had been impacted by an alleged "blocker" policy. The Tenth Circuit reversed, concluding that although this finding may have been necessary to determine if a class action was proper, it overlapped with the merits of plaintiffs' claims. Relying on two earlier cases it had decided under Title VII,[19] the court below held that fact finding at the class certification stage is improper when the factual issues overlap with the merits.

The Tenth Circuit's decision is squarely contrary to *General Telephone Co. v. Falcon*, 457 U.S. at 147 (1982). In that case, the Court recognized that class certification issues and merit issues often overlap. *See id.* at 160 (noting that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'") (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978)). Despite this overlap, the Court held that "we reiterate today that a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." 457 U.S. at 161.

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19. *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988); *Anderson v. City of Albuquerque*, 690 F.2d 796, 799 (10th Cir. 1982).

By ignoring *Falcon* and prohibiting findings on class certification that overlap with the merits, the Tenth Circuit deepened a mature split among the circuits. The Second Circuit, for example, has also held that "[in] deciding a certification motion, district courts must not consider or resolve the merits of the claims of the purported class." *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000). The court held that it was an abuse of discretion for the lower court to consider the employer's critique of statistics proffered by the named plaintiffs in that case, recognizing that while this critique "may prove fatal at the merits stage . . . this sort of 'statistical dueling' is not relevant to the certification decision." *Id.* at 292.

In reaching these erroneous conclusions, both the Second and Tenth Circuits have relied on a flawed reading of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).[20] There, the district court conducted a mini-trial to determine whether plaintiffs stood a likelihood of succeeding on the merits in order to determine which party would bear the expense of giving notice to the class. Finding no provision in Rule 23 that could be read to authorize such a procedure, the Court found its use improper, and added: "[N]othing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.* at 177. The district court in *Eisen*, however, determined the merits of the case frontally; it decided whether the plaintiffs were likely to prevail on the merits in order to decide a procedural motion that was not authorized by Rule 23. By contrast, the Court's subsequent decisions in *Livesay* and *Falcon* squarely establish that a district court may — indeed, must — determine whether the requirements

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20. The court below did not expressly rely on *Eisen*, but its earlier decisions in *Adamson* and *Anderson* did.

of Rule 23 have been met, even when that inquiry overlaps with the merits. The majority of circuits have so held.[21]

The question of the proper approach to fact finding on class certification represents a critical issue that warrants review by the Court. As the Court has noted, "[a] district court's ruling on the certification issue is often the most significant decision rendered in these class-action proceedings." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). As noted above, if a class is certified, a settlement is often compelled, even for cases that lack merit, because continuing with litigation "run[s] the risk of potentially ruinous liability." *See* Fed. R. Civ. P. 23(f), Adv. Comm. Notes (1998).

The issue presented by this case also has broad applicability to cases outside the employment context. Indeed, many of the cases that address whether a court may make findings related to class certification that also overlap the merits arise in such diverse areas as: the antitrust laws, *see In re Visa Check/Mastermoney Antitrust Litigation*, No. 00-7699, 2001 WL 1242717 (2d Cir. Oct. 17, 2001); breach of warranty claims, *Szabo*, 249 F.3d at 674-76; securities violations, *Johnston*, 265 F.3d at 180; products liability claims, *Rhone-Poulenc*, 51 F.3d at 1294; and mass torts, *Castano*, 84 F.3d at 744.

In the Second and Tenth Circuits, the path to class certification involves no "rigorous analysis," only a pro forma glance at the plaintiffs' affidavits. Even if these affidavits are implausible on their face and contradicted by compelling

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21. *See, e.g., Johnston v. HBO Film Management, Inc.*, 265 F.3d 178 (3d Cir. 2001); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674-76 (7th Cir. 2001); *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984); *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 274 (4th Cir. 1980).

evidence, the district court has no options; certification is required. This should not be the law in any circuit. The Court should address this recurrent issue and reemphasize that compliance with class certification requirements must be demonstrated, not presumed.

IV. CONCLUSION

In combination, the lower court's two erroneous rulings make the class certification process little more than a formality. They also reflect the disarray in which the lower courts find themselves on the most fundamental questions posed in Rule 23. These problems are exacerbated by the changes wrought by the Civil Rights Act of 1991, which at once made employment law class actions more numerous, the applicable law more complex, and the application of the Court's prior decisions less clear. As a result, the rule of law applicable in a given case now depends upon where the employer is located or, in the case of an employer with nationwide facilities, on where the lawsuit happens to be filed. The Chamber submits that this state of affairs is untenable, and urges the Court to grant review in this case to reestablish the ground rules applicable to employment discrimination class actions.

Respectfully submitted,

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